87-90

No.....

FILED
JUL 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

THE SUPREME COURT OF THE UNITED STATES

October, 1986 Term

MIRANDA MITZI BURTON, by her father, next friend, and natural guardian, Carlyle Burton; CARLYLE BURTON; and NATHANIEL DENMAN, Petitioners

v.

GUS WILCOX; ALLOO DARA BAPUJI PEDERSEN BURTON ADAMS; JERRY D. ADAMS; ADAM, FLAKE & HRNCIR, a Law Partnership; FRENY BAPUJI; JOHN HRNCIR; JOE E. KELLY; PHILIP E. MOKE; DON E. POLLACK; B. WELDON PONDER; TOM RICKOFF; RAUL RIVERA; ALLAN L. WATKINS; LORRAINE WELLEMS; and JOHN YATES, Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

# APPENDIX FOR PETITIONERS

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MIRANDA BURTON, ET AL., )
)
Plaintiffs, )
)
v. )
)
GUS WILCOX, ET AL., )
)
Defendants. )

ORDER

ON THIS DATE came on to be considered the verified further amended complaint filed by the Plaintiffs in this cause alleging various violations of the United States Constitution and the Federal Civil Rights Act.

This action has a long history and has been considered by several past and present Judges of this Court. The matter was referred to the Honorable Robert B. O'Connor, United States Magistrate, for his review aand recomendation and on December 5, 1984, the Magistrate filed his findings and recomendation through

which he recommended that the Plaintiffs' complaint be dismissed as to all Defendants. The Plaintiffs filed objections to the Magistrate's findings and recomendation and because this Court agreed with the Plaintiffs that the Magistrate had failed to consider the Plaintiffs' verified further amended complaint, the matter was remanded to the Magistrate for additional findings. The Magistrate submitted his supplemental findings and recomendation on March 25, 1985, through which he again recomended that the Plaintiffs' complaint be dismissed with prejudice. The Plaintiffs' again have filed objections to the Magistrate's findings and recommendation and consequently this Court has conducted a de novo review of the entire record and file in this cause. Having conducted its de novo review, this Court is convinced that the Magistrate is correct in his

recommendation that this complaint should be dismissed, with prejudice, as to all Defendants.

As to Defendants Rivera and Kelly, this Court believes that this cause should be dismissed against those Defendants for the same reason as the Magistrate has recomended that this cause be dismissed against Defendant Yates. In addition, this Court believes that the Plaintiffs have failed to make any allegation that Defendant Bapuji acted under color of law and thus believes that this cause should be dismissed as to that Defendant.

This Court will adopt both the original and supplemental findings and recomendation of the Magistrate as its own findings and will dismiss this cause. Therefore,

IT IS HEREBY ORDERED that the findings and recomendation filed by the

Magistrate in this cause on December 5, 1984, and the supplemental findings and recommendation filed by the Magistrate on March 25, 1985, be ADOPTED as the findings of this Court.

IT IS FURTHER ORDERED that the above-styled cause filed by the Plaintiffs shall be DISMISSED WITH PREJUDICE.

SIGNED and ENTERED this 15 day of May, 1985, at 10:00 A.M.

/s/ William S. Sessions
WILLIAM S. SESSIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

| | |
|---|---|
| MIRANDA BURTON, ET AL., | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| v. | |
| | ) |
| GUS WILCOX, ET AL., | ) |
| | ) |
| Defendants. | ) |

JUDGMENT

It appearing to the Court that this cause has been dismissed with prejudice,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this cause be DISMISSED WITH PREJUDICE and that the Plaintiffs shall bear all costs of Court.

SIGNED and ENTERED this 15th day of May, 1985, at 10:00 A.M.

/s/ William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2421
Summary Calendar

MIRANDA BURTON, By her Father, Next Friend, and Natural Guardian, CARLYLE BURTON; CARLYLE BURTON; PATRICIA BURTON; and NATHANIEL DENMAN,
Plaintiffs-Appellants,

versus

GUS WILCOX, ET AL.,
Defendants-Appellees.

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Appeal from the
United States District Court
For the Western District of Texas

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JUNE 30, 1986

BEFORE RUBIN, JOHNSON, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

FACTS

This case involves a six-year-old litigation for child support and custody

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

between the plaintiff, Carlyle Burton, and his ex-wife, Alloo Adams, concerning their child, Miranda Burton. The district court, adopting a magistrate's recommendations, dismissed the complaint with prejudice. We affirm. This court does not sit as a federal family law court.

In November 1980, Alloo Adams and her husband, Jerry Adams, moved to modify Carlyle Burton's support obligations and visitation rights to Miranda Burton. The Adams' attorney was Gus Wilcox, of the firm of Adams, Flake & Hrncir. Carlyle Burton hired B. Weldon Ponder, Jr., as his attorney. On January 26, 1981, Judge John Yates of the Bexar Courty district Court held a hearing on the motion. By that time Ponder had withdrawn from the case and Carlyle Burton apparently was relying on assistance from Nathaniel Denman who was not an attorney. Following

the hearing, Denman and Wilcox scuffled in the hall of the courthouse. Judge Yates held Denman in contempt and sentenced him to three days in jail, but later dropped the contempt matter after Denman agreed to apologize, although under protest, to Wilcox. Judge Yates issued an order increasing Burton's child support obligations and modifying his visitation rights.

Burton claims he attempted to appeal from that decision but that court clerks Tom Rickoff and Lorraine Willems "secreted and destroyed" the first appeal bond he sent and that they did not give him the statutorily prescribed amount of time to file a second bond. The Texas Court of Appeals dismissed the appeal on the ground that the appeal bond was filed too late. Burton unsuccesfully sought a writ of error in the Texas Supreme Court.

In August 1981, Burton unsuccessfully sought a writ of habeas corpus in a Texas district court to procure the court-orderd visitation with Miranda. Judge Kelly presided over the hearing, and Alloo Adams was represented by John Hrncir.

Alloo Adams then filed a motion to have Carlyle Burton held in contempt of court for child support arrearages. Judge Rivera presided and found Burton in contempt.

Burton, Denman, Burton's wife Patricia, and Burton acting as next friend for Miranda Burton filed this action in federal court in May 1981. The original complaint named Wilcox, Ponder, Wilcox's law firm, Judge Yates, court clerks Rickoff and Willems, court reporter Pollock, two "John Doe" bailiffs, and Alloo and Jerry Adams as defendants. All defendants moved to

dismiss the complaint under Fed. R. Civ. P. 12(b)(6); in addition, Judge Yates move for summary judgment. Following a hearing, Judge Shannon dismissed the claim without prejudice under Fed. R. Civ. P. 12(b)(6).

The Burtons and Denman then filed an affidavit of prejudice against Judge Shannon, alleging, inter alia, that as a state judge he had signed the original child support and visitation order in 1976. Judge Shannon disqualified himself and vacated all previous orders in the case. Judge Garcia, the next judge assigned to the case, recused himself after the Burton plaintiffs and Denman filed another affidavit of prejudice. The case finally came to rest in the court of Chief Judge Sessions who permitted the plaintiffs to file a verified further amended complaint and referred the case to a magistrate. The amended complaint

added as defendants attorney John Hrncir, Texas state court judges Rivera and Kelly, and Freny Bapuji (Alloo Adams's mother). There is not evidence in the record that Bapuji and Hrncir were ever served, although Hrncir has filed a brief in this court.

The district court adopted the magistrate's findings, following supplementation, and his recomendation to dismiss with prejudice. The court awarded costs to the defendants but made no statment concerning allowance of attorneys' fees pursuant to 42 U.S.C. Sec. 1988. Appellants filed a timely notice of appeal.[1]

THE TORT CLAIM

Appellants assert that the district court improperly dismissed their complaint without considering their tort claims, brought under the court's diversity jurisdiction. The only claim raised on

/1/ Although neither the district court nor the magistrate specifically addressed claims against John Hrncir, in dismissing the cause in toto, the district court implicitly adjudicated the rights of all the parties as required in a final judgment. See, e.g., Oswalt v. Scripto, Inc. 616 F.2d 191, 194-195 (5th Cir. 1980). Ths court thus has jurisdiction under 28 U.S.C. 1291.

appeal is the claim of intentional infliction of emotional "stress" due to the separation of Carlyle Burton and his daughter Miranda.

The federal court's jurisdiction over this claim must be based on diversity, 28 U.S.C. 1332. There is no "common nucleus of operative fact" between the tort alleged by plaintiffs anther their other claims. United Mine Workers of Americia v. Gibbs, 383 U.S. 715, 725; 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Plaintiffs have failed to allege the diverse citizenship of the defendants. Even if such diversity existed, however, this court ruled in

Jagiella v. Jaiella, 647 F.2d 561 (5 Cir., 1981) that a district court properly declined to exercise jurisdiction over a father's claim that his ex-wife had caused him mental anguish by alienating the affection of their child because it would necessitate the court's involvement in domestic issues, i.e. , ... (would) require inquiry into the marital or parent-child relationship." Id, at 565. Resolution of this dispute clearly will require inquire into the parent-child relationship. In Goins v. Goins, 777 F.2d 1095 (5th Cir. 1985), we reiterated this jurisdictional rule and noted further that it applies "even if the case also involves ordinary tort or contract claims." Id. at 1061. Thus the federal court is without jurisdiction over the claim.

The Burton plaintiffs generally allege that all the defendants conspired

against them to deprive them of visitation rights and to falsely imprison Denman. The specific allegations all include such phrases as "it was part of the conspiracy," "for the purpose of executing the conspiracy.' Such conclusory allegations cannot be the basis for relief. See Russell v. Millsap, 781 F.2d 381, 383 (5 Cir. 1985) (conclusory allegations of conspiracy do not state a cause of action under Sec. 1983). All allegations that do not state a state action or a class based discrimination component, therefore, were properly dismissed for failure to state a claim for relief under 42 U.S.C. Secs. 1983, 1985, and 1986. Only the claims containing such components are discussed below.

CLAIMS AGAINST THE JUDGES

Appellants have alleged that Three Texas state judges violated their

constitutional rights. They seek both damages and injunctive relief.

Most of the appellant's allegations of judicial misconduct concern Judge Yates. A state court judge is immune from damage suits under Sec. 1983 unless the acts complainted of were not judicial acts or were acts done in the clear absence of all jurisdiction. See Pulliam v. Allen, 466 U.S. 522; 104 S.Ct. 1970, 1978-1979; 80 L.Ed.2d 565 (19844). See e.g., Holloway v. Walker, 765 F.2d 517, 522-525 (5 Cir.), cert. denied, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985). All of the wrongs that Judge Yates allegedly committed during the modification proceedings and during the contempt proceeding were judicial acts; hence Judge Yates could assert immunity.

Appellants also hint at collusion between Judge Yates and Wilcox. Even if appellants' complaint were read to

suggest that Yates and Wilcox "fixed" the trial result, no facts have been pled to show such a collusion or to show that Yates acted outside his judicial capacity. See Sparks v. Duval County Ranch Co., 604 F.2d 976, 978 (5th Cir. 1979) (en banc), aff'd sub nom. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

Appellants allege that Judge Kelly, an administrative Judge, acting along with John Hrncir and Alloo Adams, deprived Miranda and Carlyle Burton of their court-ordered visitation rights "by denial of due process and lies" during the August habeas corpus proceeding. This claim cannot be disposed of on judicial immunity grounds because it is possible, although highly unlikely, that Kelly was acting in the absence of jurisdiction if he was not properly assigned to hear domestic relations or habeas corpus

proceeding. See Tex. Civ. Stat. Ann. art. 200a Sec. 5a (Vernon 1969) (repealed Sept. 1, 1985). The dismissal of the claim against Judge Kelly was nonetheless proper because a bald allegation that the Judge denied Miranda and Carlyle Burton due process is insufficient to satisfy the factual pleading requirements of Sec. 1983. See Elliot v. Perez, 751 F.2d 1472, 1479-1480 & n.20 (5th Cir. 1985); Arsenaux v. Roberts, 726 F.2d 1022, 1023-1024 (5th Cir. 1982).

The claims against Judge Rivera stem from a September 8, 1981, hearing in which he held Carlyle Burton in contempt for, inter alia, refusing to pay $250 in attorney fees to Wilcox. As with Judge Yates, Judge Rivera, a state district court judge, had jurisdiction to hold Carlyle Burton in contempt and, therefore, to sign a contempt order. See Ex Parte Gornena, 595 S.W.2d 341, 845

(Tex. 19790. Signing, or failing to sign, a contempt order is a judicial act. Thus, Judge Rivera is immune from damages under Sec. 1983. See Holloway, 765 F.2d at 523. This immunity is not defeated by appellants' hints of collusion between Wilcox and Rivera. Id. at 522-523.

The district court did not err in refusing to grant injuntive relief. Appellants requested that all state orders based on perjured testimony be set aside, and that appellees be prohibited from interferring with visitation by the Burton appellants. In Kremp v. Dobbs, 775 F.2d 1319, 1321 (5th Cir. 1985), this court described a request that several state court rulings be vacated as "manifestly frivolous.' Appellants also are not entitled to a prohibition against interference with visitation. Under certain circumstances, such as if it were in Miranda's best interests, the Texas

judges could properly interfere with visitation. See Tex. Family Code Ann. Sec. 14.07 (Vernon 1975 & Supp. 1986). Thus, even though the judges are not immune from a request for injunctive relief, appellants have not demonstrated their entitlement to it; the claims for injuction were properly dismissed.

Appellants next argue that this case should be remanded to the district court to give them an opportunity to allege facts that would defeat judicial immunity. Appellants, however, have not alluded to a single specific fact that would undermine judicial immunity. This dispute has festered for several years, and if any facts supported appellants' position, they have had ample time to allege them. There is no need for a remand.

COURT CLERKS

Carlyle Burton alleges that court

clerks Willems and Rickoff hid or destroyed the first apeal bond he sent following Judge Yates' 1981 decision, and refused to allow him the statutorily mandated time to file a second appeal bond, which led to the dismissal of the appeal for the untimely filing of his second bond. This claim falls under Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 3204-3205, 82 L.Ed.2d 393 (1984), because he had and pursued an adequate remedy under state law; a writ of error to the Texas Supreme Court, which was denied.

Appellants contend also that Willems' and Rickoff's 40-day delay in filing their appeal "shocked the conscience." While some delays may amount to a due process violation, a forty-day delay is not of that magnitude. See Rheuark v. Shaw, 628 F.2d 297, 302-303 (5th Cir. 1980), cert. den. 450 U.S. 931,

101 S.Ct. 1392, 67 L.Ed.2d 365 (1981) assuming, without deciding, that an unjustified two-year delay in processing a direct criminal appeal violates due process. Appellants' further assertions regarding the appeal are meritless.

COURT REPORTER

Appellants assert they were denied their constitutional right to an effective appeal, in part because court reporter Don Pollock charged $2.75 per page for the transcript when the legal rate in Texas was $.84 per page. Violations of state law do not alone give rise to cause of action under the federal civil rights laws. See Williams v. Treem, 671 F.2d 892, 900 (5 Cir. 1982), cert. denied, 459 U.S. 1126, 103 S.Ct. 762, 74 L.Ed.2d 977 (1983). Appellants must also allege deprivation of a federally protected right. Id, Here, Appellants have not claimed that they

were unable to file their appeal because of the overcharge, or that $2.75 per-page charge is not rationally related to a legitimate state interest. They have not thus alleged they were "unduly" burdened to an extent sufficient to allege a valid due process clause violation. In re South, 689 F.2d 162, 165 (10th Cir. 1982), cert. denied, 460 U.S. 1069, 103 S.Ct. 1522, 75 L.Ed.2d (1983). In addition, they have not allelged that Pollock arbitrarily charged them more than for the transcript than he charged other persons. Therefore, they have not alleged an equal protection violation.

BAILIFFS

Denman alleged that Judge Yates illegally ordered bailiffs Moke and Watkins to take him into the jury room following his scuffle with Wilcox. He also claimed that Moke and Watkins required Denman to give them his belt and

that they threatened to put him in prison without written orders from a judge, clerk, or sheriff. Other complaints Denman raises are not properly before the court because they were not raised below. Gorenflo v. Texaco, Inc., 735 F.2d 835, 836 (5th Cir. 1984). Bailiffs share in judges' absolute immunity when they seize someone under his orders. Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981). Denman, thus, has no damage claim against the bailiffs for bringing him to the jury room. In uncontradicted affidavits, Watkins and Moke both stated they acted according to established procedure in taking Denman's belt from him, along with other personal items, which they returned to him after Judge Yates dropped the contempt procedings. No constitutional violation was connected with this action or any alleged verbal threats by the bailiffs.

## OTHER DEFENDANTS

The other appellees are attorneys Wilcox, B. Weldon Ponder, Jr., and John Hrncir; the law firm of Adams, FLake and Hrncir; Alloo Adams, who is Carlyle Burton's ex-wife and Miranda Burton's mother; Jerry Adams, who is Alloo Adams' husband; and Freny Bapuji. None of these appellees acted under color of state law. See Polk County v. Dodson, 454 U.S. 312, 318; 102 S.Ct. 445, 449; 70 L.Ed.2d 509 (1981); Russel, 781 F.2d at 383 (Attorneys are not necessarily state actors even though they are officers of the court). These persons may be liable under Sec. 1983 only if they conspired with state actors. Dennis v. Sparks, 449 U.S. 244, 227-28; 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). Having reviewed appellants' vague and confusing allegations carefully, we find no specific facts that would support a find

- of conspiratorial conduct.

SECTIONS 1985 & 1986

Appellants also claim that they stated a cause of action under 42 U.S.C. Secs. 1985 and 1986. Claims under Sec. 1985 require allegations of class-based animus. Shelby v. McAdory, 781 F.2d 1053, 1054, n. 1 (5th Cir. 1986). The alleged classes of pro se litigants and new wives of divorced fathers were not identified to the trial court; hence, those allegations are not properly before this court. Gorenflo, 735 F.2d at 836. Because Sec. 1986 claims are dependant upon valid Sec. 1985 claims, Bradt v. Smith, 634 F.2d 796, 801-802 (5th Cir.), cert. denied, 454 U.S. 830, 102 S.Ct. 125, 70 L.Ed.2d 106 (1981), appellants' Sec. 1986 claims are also not properly before this court.

Appellants' complaints about the procedures followed by the magaistrate

and district court are meritless. We decline to rule on such other of their arguments as are asserted for the first time on appeal.

AFFIRMED

ON PETITION FOR REHEARING

AUGUST 15, 1986

EDITH H. JONES, Circuit Judge:

It is ordered that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby denied.